Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1228

KURT SCHMIEDER,

Petitioner,

against

LOUIS H. HALL, JR., As Executor of the ESTATE OF HELEN B. DWYER,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether the finding of a district court that a plaintiff has failed to meet his burden of proof merits review by this court?

2. Whether the district court was correct in its alternative holding that the vesting of an enemy alien's property by the Alien Property Custodian deprives the alien of all legal and equitable interest in that property?

Statement of the Case

On May 16, 1969, plaintiff Kurt Schmieder, a citizen of the Federal Republic of West Germany, commenced this action against the late Mrs. Dwyer claiming she had a "moral obligation" to give to plaintiff certain cash and securities which he claimed he gave to her as a gift, "impregnable at law", when he was a citizen and resident of Nazi Germany in 1938 and she was a citizen and resident of the United States.

Following a non-jury trial held on June 30 and July 1, 1975, the Honorable Whitman Knapp filed an opinion and order dismissing plaintiff's complaint on the ground that plaintiff had failed to sustain his burden of proof and, alternatively, that plaintiff lacked standing to sue because any interest plaintiff had in the subject property was cut off in 1948 when all of his property was vested by the Alien Property Custodian pursuant to the Trading with the Enemy Act, 50 U.S.C. App. § 1, et seq.

Judge Knapp, in a detailed opinion, set forth the reasons why he rejected plaintiff's claim that in 1938 he reached a gentlemen's agreement with Mrs. Dwyer's employer Louis Hall, Sr. that the gift property would be returned to him at some future time and that a fraud had been perpetrated on him by Mr. Hall and Mrs. Dwyer. First, Judge Knapp rejected plaintiff's own testimony, which provided the sole factual basis for his claim, noting that, by his own admission, plaintiff had knowingly and willfully evaded legitimate taxes imposed by the Weimar Republic in the early 1930s, and that plaintiff's present contention was directly contrary to a sworn statement he signed in 1948. In addition, the Court carefully analyzed all of the facts and concluded "that singly or in combination they do not establish that in 1938 Mrs. Dwyer and Louis Hall, Sr. embarked upon and consummated a conspiracy to defraud Schmieder."

The Court of Appeals affirmed, in an opinion which expressed agreement with "Judge Knapp's able opinion disposing of Herr Schmieder's attempt to impose a constructive trust on certain assets given by him to Mrs. Helen Dwyer in 1938". The Court of Appeals wrote only to emphasize that principles of *res judicata* barred Schmieder's attempt to institute a new action after his original complaint was dismissed by Judge Knapp.

The underlying facts are fully stated in Judge Knapp's detailed opinion and are fairly summarized in the opinion of the Court of Appeals. Both of those opinions are contained in the Appendix to the Petition for a Writ of Certiorari and nothing would be gained by restating the facts here.

Argument

Although the petition lists eight questions which allegedly merit review by this Court, petitioner's discussion of the reasons for granting the writ deals only with Judge Knapp's alternative holding that the petitioner lost any equitable interest he might have had in the subject property when that property was vested by the Alien Property Custodian in 1948.

At the outset it should be noted that petitioner's factual assertions are based on his own testimony concerning the events at issue which was rejected by both courts below. Thus the district court specifically held that petitioner failed to meet his burden to prove that there ever was a gentlemen's agreement that the gift property would be returned to him.

At all events, the district court correctly held that, in view of the vesting of the subject property by the Alien Property Custodian in 1948, petitioner lacked standing to bring an action for the return of that property.

On December 15, 1948, the Office of Alien Property filed vesting order 12528 entitled "Stock Owned by and Debts

Owing to Kurt Schmieder". That order listed various securities traceable to the gift to Mrs. Dwyer and stated the described property

> "is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by Kurt Schmieder, the aforesaid national of a designated enemy country (Germany);"

The order concluded:

> "THERE IS HEREBY VESTED in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."

Subsequent to the vesting of this property by the Attorney General, Mrs. Dwyer brought suit for the return of the property to her on the ground that Schmieder did not have any interest in the property. The lawsuit was settled pursuant to a stipulation which provided that 55% of the total value of all securities seized would be returned to Mrs. Dwyer and that "the Attorney General will deliver to plaintiff in proper form for transfer of record to plaintiff" specific securities listed therein.

The statute pursuant to which the Attorney General vested Schmieder's entire interest in the property held by Mrs. Dwyer provides that in regard to seized property, the Alien Property Custodian may "exercise any rights or power which may be or become appurtenant thereto or to the ownership thereof in like manner *as though he were the absolute* owner thereof" (Emphasis added). (Trading with the Enemy Act, 50 U.S.C. App. § 12). This Court has held that under the clear language of this statute "alien enemy owners were divested of every right in respect of the money and property seized and held by the Custodian . . ." *Cummings* v. *Deutsche Bank,* 300 U.S. 115, 120 (1937), and cases cited therein. See also, *Balkan Nat'l Insurance Co.* v. *Commissioner,* 101 F.2d 75, 77 (2d Cir. 1939); *Societe Suisse* v. *Cummings,* 99 F.2d 387, 395 (D.C. Cir. 1938), *cert. denied sub nom. Societe Suisse* v. *Murphy,* 306 U.S. 631 (1939); *United States* v. *Silliman,* 65 F.Supp. 665, 673 (D.N.J.), reversed on other grounds, 167 F.2d 607 (3rd Cir.), *cert. denied,* 335 U.S. 825 (1948); *United States* v. *Borax Control,* 62 F.Supp. 220, 222-223 (N.D. Cal. 1945).

Even if plaintiff Schmieder retained a beneficial interest in the property when it was conveyed to Mrs. Dwyer in 1938, that interest was totally extinguished when the property vested in the Attorney General. The Court expressed the point succinctly in *United States* v. *Borax Control, supra* at 223:

> "The Alien Property Custodian, therefore, may now be said to hold full and complete title to enemy property in behalf of the United States, *without any beneficial interest remaining in the former owner.* He may deal with such property, including the selling of it, in any manner appropriate to the interests of the United States." (Emphasis added).

Thus, the United States Government had the unfettered right to dispose of any interest Schmieder had in the property. Since the claim that the Government was finally settling when it reconveyed the property to Mrs. Dwyer was a claim that Schmieder retained some beneficial interest in that property, it is clear that the very interest which Schmieder here asserts is the one which the Alien Property Custodian seized by the vesting order and finally disposed of in the settlement with Mrs. Dwyer.

Thus the court below correctly concluded that plaintiff lacked standing to maintain a cause of action against Mrs.

Dwyer's estate for the return of the securities she received in 1938 because all his rights and interests in them were vested by the Attorney General in 1948.

Conclusion

The petition for a writ of certiorari should be denied. The Court should also reject petitioner's suggestion that its action be held in abeyance until the determination of a related action in Massachusetts. That action was originally stayed pending decision in this action, and it is important that all proceedings herein be concluded so that the principles of *res judicata* reiterated by the court below can swiftly be applied in the Massachusetts action.

Respectfully submitted,

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